BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROGER O. SMITH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,021,059
DUSIN ENTERPRISE, INC.	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent appeals the October 25, 2005 Award of Administrative Law Judge Bryce D. Benedict. Claimant was awarded benefits for a 52.7 percent permanent partial general work disability for injuries suffered on April 8, 2004. The Appeals Board (Board) heard oral argument on February 1, 2006.

APPEARANCES

Claimant appeared by his attorney, Paul D. Post of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, James B. Biggs of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). Additionally, at oral argument, the parties agreed that if claimant was entitled to a permanent partial general work disability, the $10-per-hour imputed wage utilized by the ALJ in the Award would be appropriate as claimant's post-injury wage earning ability. Respondent, however, does argue that due to claimant's voluntary termination of employment, he should be limited to his functional impairment only and not entitled to any work disability under K.S.A. 44-510e.

ISSUES

What is the nature and extent of claimant's injury? More particularly, does claimant's voluntary termination of employment preclude him from entitlement to a permanent partial general work disability under K.S.A. 44-510e? If not, what would

claimant's loss of task performing abilities under K.S.A. 44-510e be for purposes of computing claimant's work disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

Claimant, a flooring installer, began working for respondent in February of 1998. On April 8, 2004, while carrying a roll of carpet, which claimant estimated weighed between 100 to 150 pounds, claimant injured his low back. Claimant did not initially seek treatment that day, but continued performing his job duties. However, he testified that he felt terrible as he was working that day.[1] He also testified that the pain increased,[2] with pain radiating into his right leg.

Claimant sought treatment the next day from Dr. Wiley Alexander, a chiropractor, but obtained no relief from that treatment. A few days later, claimant was unable to walk and was taken to Community Memorial Hospital in Marysville, Kansas, where he was treated by Donald Argo, M.D., and hospitalized for a little over a day. After his release from the hospital, claimant continued under Dr. Argo's treatment, eventually being referred to and coming under the treatment of James R. McAtee, M.D., a board certified orthopedic surgeon. Dr. McAtee first examined claimant on July 21, 2004, on a referral from Dr. Argo. After undergoing x-rays and an MRI, claimant was diagnosed with degenerative disc disease in the lumbar spine. Dr. McAtee prescribed physical therapy and recommended that claimant see Dr. Steve Peloquin for pain management. The physical therapy was authorized by the insurance company, but the pain management with Dr. Peloquin was denied. Dr. McAtee also recommended claimant be provided a TENS unit, as claimant had advised him that the electric stimulation performed during physical therapy was beneficial in the reduction of his pain. However, the TENS unit recommendation was also rejected by the respondent's insurance company. Dr. McAtee then determined that, as he did not consider claimant to be a proper candidate for surgery, claimant was at maximum medical improvement (MMI) and referred claimant for a functional capacity evaluation (FCE). Dr. McAtee provided claimant with a work status report dated November 17, 2004, indicating that claimant was at MMI, but also indicating that claimant had been referred for an FCE and claimant would not be able to return to employment. Dr. McAtee indicated that claimant would not be able to return to work until he was able to determine the appropriate restrictions to be placed upon claimant based upon the findings from the FCE.

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[1] R.H. Trans. at 17.

[2] R.H. Trans. at 16.

Claimant testified that when he attended the FCE on December 2, 2004, he was taking Tramadol (a muscle relaxant/pain killer).

On the day after claimant provided respondent with the November 17, 2004 work status report from Dr. McAtee, claimant also provided respondent with a voluntary termination of employment letter dated November 18, 2004. The letter states that claimant had discussed with Robert L. Dusin, the president of respondent business, that he was not physically able to return to his position as a carpet installer. It also indicates that this had been discussed with Mr. Dusin on the afternoon of November 17. Mr. Dusin acknowledges that the November 17 medical work status report from Dr. McAtee was provided to him, but denies that there was any discussion with claimant on that date regarding claimant's possible termination of employment. Mr. Dusin testified that claimant's termination of employment on November 18, 2004, was not anticipated by him. Mr. Dusin went on to state that he believed claimant would return to work and that Mr. Dusin was simply waiting for the doctor's release and physical restrictions in order to determine what would be necessary to accommodate claimant. Mr. Dusin testified that they anticipated being able to accommodate claimant and, after receiving the FCE, stated that he would be able to accommodate most of the restrictions, with the only concern being the restriction against occasional crawling, occasional stooping and occasional floor reaching. Mr. Dusin testified that he would have to arrange for someone else to perform those job duties.

After terminating his employment, claimant applied for unemployment benefits in December of 2004, but was denied those benefits. Claimant testified he continued looking for replacement employment through March of 2005, at which time he was approved for and began receiving Social Security disability. As of that time, he ceased seeking employment and has not looked for employment since.

Claimant was referred for a vocational evaluation with vocational expert Richard W. Santner. Mr. Santner provided a task list containing sixteen tasks, describing claimant's work activities for the 15 years preceding his injury. As claimant had been employed with respondent since 1989, the entire 15-year period involved performing job duties with respondent.

In reviewing the task list, Dr. McAtee originally determined that claimant was able to return to employment and perform all sixteen tasks. However, after being advised that while undergoing the FCE, claimant was on Tramadol, Dr. McAtee determined that claimant would be less physically capable of performing activities than Dr. McAtee had originally anticipated and determined that claimant was then unable to perform five of the sixteen tasks, for a 31 percent task loss. During cross-examination, Dr. McAtee was asked several questions regarding various tasks on the list. Dr. McAtee testified that in his opinion, the tasks, as described by Mr. Santner and as verified by claimant, did not adequately describe the physical duties required to perform those tasks. Dr. McAtee felt certain of the tasks which were described as requiring frequent stooping, kneeling or

crawling could be done without stooping. He further indicated that he did not know why kneeling would affect claimant's back in any way.

Claimant was referred by his attorney to Peter V. Bieri, M.D., a fellow of the American Academy of Disability Evaluating Physicians, for an evaluation on March 11, 2005. Dr. Bieri found claimant to be at MMI, diagnosing claimant with multiple level degenerative disc disease, including a herniated nucleus pulposus on the right at the level of L2-3 with clinical radiculopathy. He assessed claimant a 10 percent impairment to the body as a whole pursuant to the fourth edition of the AMA *Guides.*[3] This was slightly higher than the 5 percent whole person impairment assessed by Dr. McAtee, with Dr. McAtee's impairment also pursuant to the fourth edition of the AMA *Guides.*[4]

Dr. Bieri, in reviewing Mr. Santner's task list, found claimant had lost the ability to perform ten of sixteen tasks, for a 63 percent task loss. The ALJ, in calculating the task loss accurately, determined that this was actually a 62.5 percent task loss.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[5] In this instance, the ALJ determined that claimant had suffered a 10 percent impairment of function to the body as a whole pursuant to the opinion of Dr. Bieri. The Board, in reviewing the evidence in this record, finds that Dr. Bieri's opinion is the more credible over that of Dr. McAtee. Dr. McAtee, who assessed claimant a 5 percent impairment, found 4 percent of it to be preexisting, with only 1 percent occurring as a result of the injuries of April 8, 2004. The Board finds claimant was able to perform his work duties for years prior to the April 8, 2004 incident without significant limitation. It was after the injury of April 8, 2004, that claimant was no longer able to return to those job duties. Therefore, Dr. McAtee's opinion that claimant suffered only a 1 percent functional impairment from those injuries is not persuasive. The Board agrees with the ALJ in adopting the opinion of Dr. Bieri that claimant has a 10 percent functional impairment to his lumbosacral spine as a result of the injuries of April 8, 2004.

Likewise, Dr. McAtee's opinion regarding claimant's task loss is not persuasive. Dr. McAtee originally determined that claimant had no task loss. Then, when being advised that the FCE was performed while claimant was on Tramadol, Dr. McAtee determined that claimant had lost the ability to perform five of the sixteen tasks. Dr. McAtee then questioned the tasks as described by Mr. Santner and affirmed by claimant, determining that his expertise in deciding what physical activities were performed

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[4] AMA *Guides* (4th ed.).

[5] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

while doing those tasks was better than either the vocational expert or the person performing those physical activities. The Board, again, considers the opinion of Dr. McAtee to be suspect. The ALJ, likewise, determined that the more persuasive opinion was that of Dr. Bieri, who found claimant to have lost the ability to perform ten of sixteen tasks. K.S.A. 44-510e mandates that the task loss opinion be in the opinion of the physician. In this instance, the Board finds Dr. Bieri to be more persuasive and, therefore, adopts his finding in affirming the determination of the ALJ.

K.S.A. 44-510e also mandates that it be determined what, if any, wage loss a claimant has suffered. In this instance, respondent argues that claimant's voluntary termination of employment on November 18, 2004, constitutes a lack of good faith on claimant's part. In *Foulk*,[6] the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the current version of K.S.A. 44-510e) by refusing an accommodated job that paid a comparable wage. Here, respondent testified through Mr. Dusin that claimant would have been accommodated had he continued his employment with respondent. The restrictions placed upon claimant by Dr. McAtee after he reviewed the FCE were not so severe as to prohibit respondent from bringing claimant back to work at an accommodated position. The Board finds claimant's decision to voluntarily terminate his employment and claimant's failure to maintain his employment constitute a lack of good faith on claimant's part.

In *Copeland*,[7] the Kansas Court of Appeals held that if a finding is made that a good faith effort has not been made, then the fact finder will have to determine an appropriate post-injury wage based upon the evidence presented before it, including expert testimony concerning the capacity to earn wages.[8] In this instance, the Board does not have to determine claimant's capacity to earn wages, as the parties have stipulated that should a permanent partial general work disability be appropriate, the $10-per-hour wage imputed by the ALJ is acceptable to both parties. The Board, therefore, finds, as did the ALJ, that a $10-per-hour wage should be imputed to claimant based upon a 40-hour week, resulting in a 42.9 percent wage loss.

Respondent argues that the wages claimant was earning at the time of his injury with respondent should be imputed to him, resulting in a determination that claimant had the ability to earn a comparable wage, which, pursuant to K.S.A. 44-510e, would restrict him to his functional impairment only. However, even though respondent testified that it was able to accommodate claimant, there is no testimony in the record regarding what, if

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Id*. at 320.

any, wages and benefits this accommodated work would pay. The Board, therefore, cannot determine based upon this record that respondent would have paid claimant a comparable wage or even 90 percent of the wage claimant was earning at the time of his injury. The Board is, therefore, limited to claimant's capacity to earn wages and, in that regard, the stipulation by the parties that claimant had the ability to earn $10 per hour.

K.S.A. 510e requires that both the wage and task losses be averaged in order to determine what, if any, permanent partial general work disability a claimant has suffered. The ALJ in averaging the 42.9 percent wage loss and the 62.5 percent task loss determined claimant had suffered a 52.7 percent permanent partial general disability. That finding is supported by the evidence in this record and is affirmed by the Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated October 25, 2005, should be, and is hereby, affirmed in all regards.

IT IS SO ORDERED.

Dated this ____ day of February, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Post, Attorney for Claimant
James B. Biggs, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director